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Citation for published version:

MacAllister, J 2019, 'Enhanced agency rights for older Scottish children with additional support needs: A philosophical review', *International Journal of Inclusive Education*, vol. 23, no. 5, pp. 519-531.
<https://doi.org/10.1080/13603116.2019.1580924>

Digital Object Identifier (DOI):

[10.1080/13603116.2019.1580924](https://doi.org/10.1080/13603116.2019.1580924)

Link:

[Link to publication record in Edinburgh Research Explorer](#)

Document Version:

Peer reviewed version

Published In:

International Journal of Inclusive Education

Publisher Rights Statement:

This is an Accepted Manuscript of an article published by Taylor & Francis in International Journal of Inclusive Education on 18/02/2019, available <https://www.tandfonline.com/doi/full/10.1080/13603116.2019.1580924>.

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Enhanced agency rights for older Scottish children with additional support needs: A philosophical review

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This paper considers some possible pitfalls in recent legislation in Scotland that has enhanced agency rights for older children with additional support needs (ASN). It does so with particular reference to philosophical literature on children's rights. Though the UNCRC increasingly animates education law, policy and practice in Scotland and elsewhere, some philosophers, including O'Neill and MacIntyre, have raised pertinent questions about whether or not a rights-based approach is the best way of ensuring that all children receive the care, support and education they need to flourish. Discussion concentrates on four possible objections to the human rights tradition generally and the new legislation concerning the rights of older children with ASN in Scotland specifically. It is concluded that: 1) future policy, practice, law and research on child well-being should prioritise capabilities over rights and; 2) the concept of capability might be a helpful one through which to analyse the extent to which children with ASN in Scotland really do have enhanced agency rights in practice.

Keywords: rights, agency, children, MacIntyre, Nussbaum, capability

Introduction

The Education (Scotland) Act 2016 has, broadly put, granted children with additional support needs (ASN), of 12 years or over, the same legal rights and status as their parents (Harris 2018). This legislation was in no small part designed to address worries that article 12 of the *United Nation Convention of the Rights of the Child* (UNCRC) was not being consistently applied in respect to children with disabilities in Scotland. In 2008 the UN Committee on the rights of the child reported concern that 'little progress' in the UK had been made 'in enshrining article 12 in education law and policy' (CRC 2009, para. 32). They also noted 'that insufficient action has been taken to ensure that the rights enshrined in article 12 are applied to children with disabilities' (CRC 2009, para. 67). A

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key intention of the 2016 legislation in Scotland has therefore been to facilitate adherence to article 12 in Scotland. This article stipulates that:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law. (as quoted in Harris 2018, 21)

In guidance to local authorities responsible for implementing the new legislation, some highly ambitious declarations are made. In particular, it is suggested that the new legislation is part of a wider policy agenda to make Scotland the ‘best place to grow up and bring up children. This ambition requires ... a positive culture towards children. One where children are listened to, where their views are heard and their rights protected’ (Scottish Government 2017, para. 7).

The vocabulary of rights has for over a decade become increasingly prominent in Scottish education law and policy that relates to children with ASN. A landmark moment in this respect came with *The Additional Support for Learning (Scotland) Act 2004* which granted all children in Scotland the right to education that enabled their talent, personality and capacities to be developed to the full. This Act introduced the concept of additional support need, which is broader and more inclusive than the concept of special educational needs which preceded it. According to the 2004 legislation, any child should be granted ASN whenever they would be unable to benefit from educational provision without that additional support. A further influential policy of Getting it Right for Every Child (GIRFEC) came to the fore via *The Children and Young People (Scotland) Act 2014* (Harris 2018). This legislation is also underpinned by a desire to realise article 12 of the UNCRC as it places a focus on the rights of children to be listened to. Harris (2018) concludes there can be little doubt that the latest legal and policy reforms in Scotland have been designed to ensure the maximum possible participation of children with ASN (of 12 and above) in line with article 12. However, controversially, older children with ASN will only be able to exercise their new rights of

participation after the local education authority in question has carried out an assessment that deems that the child wanting to exercise the right has ‘sufficient maturity and understanding’ to do so and that the process of exercising rights will not ‘adversely affect the wellbeing of the child’ (Harris 2018, 16). Though the legislation does then grant independent rights to children with ASN of 12 or above, the local authority still has a crucial role in deciding whether or not such children will be able to exercise their rights.

This legislation may benefit many children and families in Scotland. However, important philosophical questions concerning the nature and value of a rights-based approach to childhood wellbeing are opened up by the new legislation. Though the UNCRC increasingly animates education law, policy and practice in Scotland and elsewhere, some philosophers, have raised pertinent questions about whether or not a rights-based approach is the best way of ensuring all children receive the care, support and education they need to flourish. This paper therefore considers some possible pitfalls with the new legislation in Scotland with particular reference to philosophical literature on children’s rights. It is the first paper to do so. A brief overview of the evolution of the children’s rights tradition is initially provided. Discussion thereafter focuses on four possible objections to the human rights tradition generally as well as to the new Scottish legislation specifically. First, that human rights might be moral fictions that encourage individualistic and manipulative behaviour. Second, when thinking about child welfare, building law and policy up from the fundamental obligations adults have towards children might be a better starting point than allocating fundamental rights to children themselves. Third, a care-based approach to bringing up children might be preferable to a rights-based approach. Fourth, attaching competence tests to rights (as the new legislation in Scotland does) can leave children and young people prey to manipulation by those in power and facing the prospect of being in the dark about when they will definitely have autonomy rights about important matters affecting them. It is concluded that: 1) future policy, practice, law and research on child well-being should prioritise capabilities over rights; 2) the concept of *capability* might be a helpful one through which to

analyse the extent to which children with ASN in Scotland really do have enhanced agency rights in practice.

Children and rights: A brief history of philosophical ideas

Relative to the long history of philosophy, it is only very recently that *children* have become a topic of serious and systematic philosophical discussion in their own right (Archard and Macleod 2002).¹ However, in moral and political philosophy two general ideas about children, traceable back to Aristotle, have been long influential. These are that children are the property of their parents and that they are incomplete adults (Archard and Macleod 2002). In respect to the former idea, Archard and Macleod hold that Aristotle believed that parents have sovereignty over their children until they reach a certain age, as the child is ‘a part of’ the parent. In respect to the latter idea, children are indeed deemed incomplete human beings by Aristotle in the spheres of ethics, biology and politics as they are not yet capable of the rational choice that is a necessary part of any flourishing adult life (McGowan Tress 1997). Archard and Macleod (2002) conclude that in Aristotle’s thinking children are viewed negatively for what they are not capable of rather than positively for what they are capable of.² These two ideas were said to justify a *constrained paternalism* towards children – ‘*constrained*’ because parental authority over a child must be for the good of the child and it should last only so long as children are deemed incapable of making their own choices (Archard and Macleod 2002). At the time of the eighteenth century Enlightenment, Kant (2007) contested the legitimacy of the first idea that children are the property of parents. He instead insisted that parents have a responsibility and right to develop their children as best they can.

¹ One can only assume that Archard and Macleod (2002) 1) have disregarded Aristotle’s lost treatise on the upbringing of children 2) do not consider Rousseau’s *Emile* to be systematically philosophical.

² This is arguably a caricature of Aristotle. Aristotle did not so much view children negatively as incapable but rather thought that children had not yet actualised their potential capabilities. As we shall see in section 5, Dixon and Nussbaum (2012) have reformulated some Aristotelian ideas on the capabilities of children showing that his thinking on children can be interpreted more positively.

This right can be connected with Kant's more well-known humanity and autonomy laws; that each human person has a duty to respect the dignity of others (the humanity formula) and that each person be free to rationally determine the nature of their own lives (the law of autonomy). Griffin (2002) suggests that though the various articles that make up the UNCRC have no explicit philosophical or theoretical underpinnings, the fact that they do make reference to the 'inherent dignity of the human person' does render the human rights tradition easily compatible with Enlightenment conceptions of morality. However, there is some consensus that the modern word 'right' first emerged in the middle ages (see for example Griffin 2002; Arneill 2002; MacIntyre 1984). Griffin claims that over the course of the twelfth and thirteenth centuries *ius* (Latin for right, law or duty) expanded to mean not just what was fair but also something that more closely resembled our modern sense of right – namely a power or capacity to claim, control or do something. Importantly, Griffin (2002) argues that while the human rights tradition does not inescapably lead to any one particular account of human rights, human rights might nonetheless be best understood as protections of human standing and personhood. While the idea of parents having rights with respect to their children has therefore existed since at least the 18th century, when Kant was writing, the idea that children might themselves be bearers of rights only began to emerge out from the 'childhood liberation' movement pioneered by Farson and Holt in the 1970s (Archard 1993).

The child liberation movement wanted to challenge what Archard dubs the traditional 'caretaker' view of childhood. On the caretaker view children should not be seen as self-determining agents; the "caretaker thesis" thinks self-determination too important to be left to children' (Archard 1993, 52). Furthermore, paternalism is merited on this view as children have not yet developed the cognitive capacities and stable preferences to make intelligent choices. Lastly, 'the good caretaker must strive both to realise the child's particular nature and to safeguard it's open future' (ibid, 57). In contrast to this, those in favour of child liberation claimed that the 'modern separation of child and adult worlds is an unwarranted and oppressive discrimination' and

that this ‘segregation is accompanied and reinforced by a false ideology of childishness’ (Archard 1993, 46–47). They also claimed that children should be entitled to all the rights possessed by adults’ (Archard 1993). Childhood liberationists held that the idea of children being inherently vulnerable and in need of protection by adults is a false ‘ideological construct which helps to support the denial of their proper rights. The innocence and incompetence of children is not a biological fact’ (Archard 1993, 49). Childhood liberationists identified two categories of rights. Namely, rights which do not require children to do anything and rights that require children to choose and act for themselves. In rights of the first kind the onus is upon others (usually adults) to protect and help support the development of the child. Rights of this kind include protection from violence and abuse and the right to a minimum standard of education and care. In contrast, if and when children possess rights of the second kind the onus is upon them to choose for themselves how to lead their lives. Brighouse (2002) refers to the first kind of right as a *welfare* right and the second kind as an *agency* right.

Child liberationists wanted rights of both kinds to be extended to children. They believed that while well cared for children could be said to possess what Brighouse calls welfare rights, very few children possess agency rights insofar as society is generally very paternalistic towards children. The academic discussion of childhood liberation may or may not have helped to raise public awareness about the need to extend agency rights to children. In contrast, the adoption of the UNCRC by over 120 countries in 1989 certainly provided a new and increasingly powerful legal instrument for granting greater rights to children, including agency rights. However, it is worth considering how the arguments from the child liberation movement are more radical than both the UNCRC generally and the new legislation in Scotland in respect to children with ASN in particular. As Archard (1993) notes, Farson, one of the first child liberationists, argued that *all* rights needed to be extended to *all* children of *all* ages.³ In contrast, the UNCRC and the new legislation in Scotland

³ Archard does concede that Farson did not argue for babies to be granted rights.

places strict limits on which children may be granted some agency rights which are based upon considerations of their relative maturity, and – in the case of Scottish children with ASN – also their wellbeing. The new legislation in Scotland could therefore be regarded as quite conservative with respect to the radical demands of the childhood liberationists. After all, it is only children of 12 or over that have been granted the right to express a view, and only some of these at that (i.e. those whom the local authority deem to have capacity and whose wellbeing will not be diminished in the process of having a voice). However, there are some flaws in the childhood liberation argument. Archard maintains that: it ‘is one thing to underestimate the capacities of children, another to reckon them equal to those of adults’ (1993, 50), perhaps especially in the case of very young children. It may therefore be no bad thing that the new legislation in Scotland does not satisfy the more revolutionary requirements of the 1970s child liberationists for all children – even the very young – to be granted full agency rights. Indeed, rights-based approaches might not generally provide the best way of ensuring that children receive optimal protection, nurture and education.

What is wrong with children’s rights?

... possession of rights is not a cure-all. Any expansion of entitlements must form part of a more general empowerment. But, like it or not, rights are an important part of our moral and political discourse. How we see and value humans is crucially determined by what rights we accord them. Giving rights to children is thus a public and palpable acknowledgement of their status and worth (Archard 1993, 168–169)

Archard (1993) defends the value of granting children rights as such rights allocation can be construed as a public acknowledgement of their moral and human worth. Nonetheless, he opens up the question of what might be wrong with speaking of children’s rights. He considers, but ultimately rejects, six possible objections to a rights-based understanding of childhood. First, if someone (a child) lacks a right, someone else must have it (the parent). Second, only at the point where a parent’s right ceases does a child have any rights. Third, a person has all the rights associated with adulthood or none at all. Fourth, individual rights are possessed completely or not at

all. Fifth, concerns cannot be moral unless they are expressed in rights terms and lastly people either have autonomy/agency rights or they do not.

With respect to the first objection, Archard rightly points out that unpossessed rights, such as the right to vote, cannot be claimed by others: that a child cannot vote does not mean that their parents get an extra one. Archard concedes that few writers defend the second idea that rights attach to parent or child, but not both. However he does draw attention to how the rights of parents can come into conflict with those of children. Archard's point is that when parents and children's rights come in to conflict, it is not that parents have no rights if children are granted them, but that the rights of children may constrain the rights of parents. For Archard, the third objection is also obviously false as children are generally granted at least welfare if not agency rights. In the case of the fourth objection, Archard concedes that rights can be thought of as all or nothing: either you have a right to marry or you do not. However, certain rights come with caveats or conditions. The new legislation in Scotland is a prime example of this, as children of 12 or over with ASN are granted the right to express a view in all matters concerning them including judicial hearings, but *only after the conditions* of wellbeing and capacity/maturity are deemed to have been met. Archard thinks that such conditions show that rights possession is not 'all or nothing', but 'all or less than everything' (1993, 86).⁴ Archard also thinks that the fifth objection is exaggerated rhetoric and that few if any writers actually claim that rights exhaustively define the moral. Regarding the final objection Archard claims that dichotomous understandings of rights are unhelpful. Even if young children lack competence to judge what is good for them this does not mean that their wishes are irrelevant or invariably unreliable when it comes to gauging what is in their interests.

⁴ I disagree with Archard here – the fourth objection is true not false. Take the new legislation in Scotland. An adolescent of 14 who is not deemed capable of expressing a view by their local authority does not have part or whole of the right to express a view – a judgment has been made and they do not have the right to express a view.

Archard concludes that the ‘acquisition of rights is a sort of moral watershed. But it does not follow that those who have rights have everything morally flowing their way and that those on the other have nothing’ (Archard, 1993, 88). Other philosophers are less positive about the connection between rights and morality. MacIntyre argues that to believe there are human rights that all humans have in virtue of their being human is akin to believing in witches and unicorns (MacIntyre 1984). He reasons that in the same way that every attempt to prove the existence of witches and unicorns has failed so too has every attempt to prove the existence of human rights based upon universal facts of the human condition. For MacIntyre ‘there are in no way universal features of the human condition’ (1984, 67). Human rights are instead an unhelpful ‘moral fiction’ (1984) – unhelpful, as human practices, underpinned by a rights-based understanding of human personhood encourage human beings to be individualistic and manipulative in their dealings with others (1984). In his most recent work, MacIntyre continues to insist that human rights are ‘philosophical fictions’ (2016, 78), instead preferring an Aristotle inspired ethics. Still, while he can undoubtedly be regarded as a great skeptic of human rights, it should also be acknowledged that he has in this more recent work stressed that the impact of human rights upon human practices has not always been, and need not be, negative. However, he thinks that justice would be better achieved via other (such as Aristotle-inspired) ethical frameworks. He says: ‘it is of course true that in many situations appeals to human rights ... have played an important part in securing the rights of deprived and oppressed individuals and groups ... (but) ... In all such cases there were and are better arguments for doing what justice and the common good require than those appeals provide (2016, 78).

While MacIntyre criticised human rights in general, O’Neill (1988) famously criticised the increasingly popular idea that children should have fundamental rights. She questioned why so much modern debate about ethical issues in children’s lives focusses on *children having fundamental rights* not on the *fundamental obligations that others have to children*. O’Neill explains that from the eighteenth century onwards there was a shift in focus from giving rights to the person who had to protect the welfare and development of the child (Kant’s view) to giving

rights to the child themselves. However, O'Neill thinks that this shift is odd. Giving welfare rights to children will not in itself protect child welfare and development. Her reasonable point seems to be that if the object of (at least welfare) rights is to protect child welfare and development then, from a practical point of view, it is first and foremost the agency of adults that needs targeting. It is adults who must protect, support and refrain from harming children. Children should not bear this responsibility.⁵ O'Neill, unlike child liberationists, thinks that there is a clear difference between the dependence on adults that children can and usually do grow out of, and systematic adult oppression. She says that those:

with power over children's lives usually have some interest in ending childish dependence. Oppressors usually have an interest in maintaining the oppression of social groups. Children have both less need and less capacity to exert 'pressure from below,' and less potential for using the rhetoric of rights as a political instrument. Those who urge respect for children's rights must address not children but those whose action may affect children (O'Neill 1988, 462)

O'Neill pithily observes that children do not need fundamental rights: they need to grow up. They also need others to meet the obligations that these others have towards them. She maintains that the rhetoric of rights becomes especially problematic when it aspires to be the only ethical principle, echoing Archard's fifth concern above. O'Neill maintains that a rights-based account of the ethical life of children is unduly narrow. In particular, it cannot explain the significance of imperfect obligations: 'imperfect' insofar as such obligations are owed not to every child but only specified ones. To explain this point, she takes the example of the cold and distant parent or teacher who does not violate any fundamental right of the child but nevertheless fails to provide the warmth, and good feeling that children need to grow in a healthy way. Barbara Arneill (2002) picks up on these concerns, maintaining that dependence on others and a need for care are universal

⁵ In this respect it is concerning that the new legislation in Scotland places the burden on children themselves to challenge education placement decisions taken by local authorities in Scotland (Riddell and Carmichael 2019).

requirements of childhood, not rights. As such, children do not mainly need rights but relationships of care than enable them to grow. In an ethic of care, responsibilities of care for children have primacy over rights. In an ethic of care it is also assumed that as people (children and adults alike) are inherently relational and interconnected, the state should do all it can to support the emergence of the caring relationships that children most need. Proponents of care ethics also maintain that the activity of caring for children must be taken more seriously than it currently is in private and public domains.

Arneill stresses that from a care ethical perspective on childhood, the liberal idea of the autonomous self, as free to pursue whatever actions and projects it wishes, takes a back seat to the need for all in communities to care for each other. Cognisant of such objections, Archard (1993) concedes that the language of rights can be very morally impoverishing. However, he argues it is mistaken to think that family relationships can be based on rights or bonds of affection but not on both. When relationships break down 'recourse to rights may well be what is second best. But this is not by itself a reason not to have rights' (1993, 91). Still, Archard thinks that rights are certainly not all that matters when thinking about how to provide children with the support, protection and care they need to develop into happy and healthy adults. Indeed, he claims that childrearing should be egalitarian, democratic and (modestly) collectivist. Nonetheless, unlike O'Neill, Archard believes that all children should be granted fundamental welfare rights, since such rights acknowledge their human and moral worth. O'Neill is undoubtedly correct to point out that if the aim of welfare rights is to protect children from harm and secure their healthy development, then targeting the actions of those who may hinder or enable such aims is better than merely granting children rights. However, this is very far from being a knock down argument against children being granted welfare rights. This is so, since such rights can (even when not framed as fundamental obligations) have the great practical value of making clear to everyone, including those who may harm children or hinder their development, that all children are owed our protection and support. O'Neill's argument does lend credence, though, to the idea of getting rid of children's rights

legislation and policy altogether and to creating a new charter of fundamental obligations to children. Arneill, in turn, would like to supplant a rights-based approach with an ethic of care. In contrast, Archard thinks that insofar as rights talk is already inescapably part of moral and political discourse with respect to children, it is better to work with what we have got.

Agency/autonomy rights and competence tests

There is therefore far from philosophical agreement that a rights based approach is the best way to ensure that children receive the care, support and education they need to flourish. However, MacIntyre, O'Neill and Arneill aside, there is general support amongst other philosophers for the view that children should be granted welfare rights (see for example Archard 1993; Griffin 2002; Brighouse 2002). Archard, Griffin and Brighouse are also in agreement that *older* children should be granted agency rights, but only progressively. Archard (1993) is clearly critical of the more radical demands of the child liberation movement that all children should be granted all rights. Nonetheless, he also argues that it should generally be assumed that older children (he specifically has teenagers in mind) can rationally self-determine in ways that younger children cannot. Griffin (2002) also argues young children are not full agents as they lack the capacity of autonomy. Brighouse (2002) draws the same conclusion that young children are not agents, because they have yet to develop the stable desire and preference structures that are necessary to conceive and then live out an authentic and freely chosen life. Griffin and Brighouse do, however, both stress that older children can and do often have the capacity for self-determination. Children progressively develop capacities for agency and autonomy as they mature. These authors therefore consider it appropriate to grant agency rights to older children. Archard (1993), however, questions whether the practice of granting rights to children based on age alone is the fairest approach. He considers the possibility that such approaches are arbitrary and that a competence test might be a fairer way of deciding who should and should not be granted such rights.

An example to bring out Archard's general argument might help here. Is it just when a system denies Jane – an intelligent, politically active adolescent two days short of her 18th birthday

– the right to vote, when Jim who is one a week older but has never shown any interest in or knowledge of politics is granted the right to vote? Archard ultimately thinks not. What may matter most legally is not so much individual cases but overall probabilities (Archard 1993). If there is good evidence that the majority of those who are aged seventeen do possess the competence to vote (whatever this might mean), then that may be a good reason to lower the voting age to seventeen. He remarks that ‘the fact that precocious individuals are unfairly penalized and immature individuals are unfairly rewarded does not then constitute an overwhelming reason to abandon the use of a fixed age ... it would only be a reason if ... the age used had been poorly chosen’ (1993, 63). Indeed, Archard concludes that there are at least four reasons to prefer granting rights based on a well-chosen age criterion than on a competence test. Firstly, competence tests may be expensive and cumbersome to administer. Secondly, they may be at risk of corruption and manipulation by those with power. Thirdly, there may be more objective agreement about age than competence and fourthly an age criterion provides a stable indicator of when a person will have a right, whereas competence tests provide no such objective boundaries. Importantly, it may be ‘disturbing not to know if and when one will ever have a right’ (ibid, 64). Tellingly, Archard concludes that teenagers should not be presumed incapable of exercising autonomy rights. Unfortunately, this is exactly what the new legislation in Scotland presumes, insofar as those with ASN between 12-15 need not only to pass a competence test but also a wellbeing test, before they can exercise their autonomy rights. What else might Archard’s framework tell us about the new legislation in Scotland? Bearing in mind the first issue, the fact that assessments of wellbeing and competence will incur costs and be complex to administer may deter under-resourced local authorities from fulfilling their responsibility to carry out competence tests. It may also mean that authorities use their power of judgment to reduce costs rather than act in the interests of the child.

For example, if a local authority knows that an education placement could be very costly to them, and its budget has been squeezed, the temptation might be to consider any child who is borderline capable, as not being capable. In line with the fourth concern outlined above, many older

children with ASN in Scotland now face the ‘disturbing’ prospect of not knowing when they will be permitted to participate in important decisions about them and their future. It should of course be remembered that some teenagers in Scotland to whom the new legislation applies will have profound cognitive disabilities that could undoubtedly call their capacity for autonomy into question. However, the scope of those who are classified as ASN in Scotland is broad and the vast majority of children with ASN do not have profound cognitive disabilities.⁶ Moreover, there are at least three clear advantages to granting children the opportunity to form rational judgements even in the absence of full rational capacity. First and foremost, it may be educational for the children involved to do so, and generative of the very capacity for autonomy in question. Archard reasons that children may ‘display incompetence because they have been prevented from doing what would give them the ability’ (ibid, 68). The point here is that if children are encouraged to express views about what they think best, then whether or not they already have what might be called *mature enough autonomy*, the process of being listened to and taken seriously may help them to improve their capacity for autonomy. Archard and Skivenes (2009) identify two further reasons why it may be important to give children some voice relative to their capacity to form rational judgements about what is in their best interests. The *pragmatic* reason is that the process may help in the gathering of relevant information about what decisions and actions are in their interests. The *moral* reason is that children are arguably entitled to have their views heard and to refuse this would be an affront to their dignity as persons. In sum, the consideration of competence tests just now shows there are clearly some pitfalls with the new legislation with respect to the agency rights of children with ASN in Scotland.

⁶ For example as few as just over 20 children out of every thousand in Scottish schools have a more severe learning disability with this category of ASN representing only the 8th largest category of ASN in terms of incidence (Carmichael and Riddell 2017).

Should policy and practice attend to children's rights or to their capabilities?

With the help of some philosophical literature, three general objections to the children's rights tradition have been considered. Each of these objections can be levelled against the new legislation in Scotland which basically aims to operationalise article 12 of the UNCRC for older children with ASN. A fourth specific pitfall with the new legislation has also emerged. What are these objections and pitfalls? First, human rights might be moral fictions that encourage individualistic and manipulative behaviour. Second, when thinking about child welfare, building law and policy upon the fundamental obligations adults have towards children might be a better starting point than allocating fundamental rights to children themselves. Third, a care-based approach to raising children might be preferable to a rights-based approach. Fourth, attaching competence tests to rights (as the new legislation in Scotland proposes) may leave children and young people prey to manipulation by those in power or remaining in the dark about when they will definitely have autonomy rights about important matters that affect them. What should the response to such objections be? Are philosophers such as MacIntyre and O'Neill correct in concluding that, all things considered, talk of children's rights is irredeemably misplaced and best abandoned? Or is Archard right to believe that in spite of some problems, rights might be allocated to children and might meaningfully help them? Or is there another theoretical perspective, not yet considered, that might address objections to children's rights? In my view, there is such an alternative perspective: namely, that of the capability approach discussed by Dixon and Nussbaum (2012). Nussbaum (2011), a leading advocate of this approach, suggests that capabilities are the answer to the question of what each person is able to do and become, or of what they have the potential to do and be. More specifically her capability approach suggests there are ten key capabilities that political orders must ensure for all citizens in the interests of justice.

While the capability approach was initially conceived as an alternative to crassly simplistic Gross Domestic Product evaluations of human wellbeing, Dixon and Nussbaum (2012) suggest it can also complement human rights laws and policies with respect to children. However, there are

important differences between rights-based approaches and capability approaches with respect to promoting child wellbeing. For example, while the human rights tradition is generally associated with Enlightenment (more specifically Kantian) ethics, the capability approach is in part inspired by Kantian ethics *but also* by the much older tradition of Aristotelian ethics generally favoured by virtue ethicists such as MacIntyre and Nussbaum. Capability theory stresses that human beings need meaningful relationships (that are nurturing not manipulative) if they are to flourish. So the capability approach can survive the first objection levelled against the human rights tradition by MacIntyre as an onus in this approach is placed on ensuring all children experience nurturing and caring relationships not manipulative ones. The fact that the capability approach also places an onus on states to protect the bodily integrity of all persons (including children) from harm means that O'Neill's second objection can also be defused. O'Neill thought it better to start thinking about the ethical lives of children by targeting the actions of those who may have impact upon them instead of allocating rights directly to children. This is exactly what the capability approach does.

Rather than allocating rights to children as the starting point, it requires the state to ensure that the actions of all protect the dignity and bodily integrity of all, including children. Unlike rights-based approaches, the capability approach can also overcome the third objection: that rights neglect the affective aspect of human life generally and the lives of children specifically. Dixon and Nussbaum (2012) stress that the capability approach accepts (much like the care ethics approach of Arneill) that human frailty and vulnerability are facts of life. Indeed, the need for caring relationships of human affiliation is one of the ten key capabilities that they think states have a duty to ensure children acquire.⁷ The capability approach can also defeat the competence test objection insofar as competence tests are simply not part of the capability rubric. The capability approach

⁷ For in depth discussion of the ten capabilities at the heart of the CA see Nussbaum (2011). For further discussion of how capability theory can be related to the education of children with special educational needs see Terzi (2005)

does not presume that young children are capable of autonomy, but nor is any lack of this considered a barrier to children having a say about important matters affecting them. Indeed, *practical reason*, the capacity to rationally plan one's life in accordance with one's wishes, is one of the ten core capabilities that Nussbaum requires states to assist people to develop. More specifically, if children, including those with disabilities, can develop capabilities (including that of practical reason), then the state has a moral obligation to allocate whatever resources are necessary to support such capability development (Dixon and Nussbaum 2012). Given this, it is worth asking whether law, policy and practice should focus attention on allocating children rights or ensuring they have opportunity to realise their capabilities?

Let us briefly clarify some differences in the two approaches before addressing this question directly. On a rights-based understanding, children generally need some combination of protection and freedom. On the one hand, children need rights of protection from any person or agency that might harm their health, welfare or development. On the other hand, children also need to be granted sufficient scope for autonomy in their lives as well as in their formal education to enable their choices to become progressively more self-determined with age. In contrast with this, according to a capabilities approach, states must ensure that all children have the opportunity to develop ten key capabilities. Such capabilities include: protection of bodily integrity, opportunity for play, opportunities for the emergence of caring relationships and an education apt for the emergence of practical reason. A key reason for favouring a capability over a rights-based approach to child wellbeing relates to the concern with the actual lived experiences of children that is at the heart of the capability approach. According to Dixon and Nussbaum: 'rights are not fully secured unless the related capabilities are actually present: otherwise rights are mere words on paper... all human capabilities have social and economic conditions that require affirmative government action (and government expenditure) for their realization' (2012, 561). The possibility that the capability approach can overcome core objections levelled against rights-based approaches, while at the same time insisting that states commit resources and energy to realising rights in practice, and not just on

paper, is the main reason for me advocating that future policy, practice, law and research on child well-being should attend to and prioritise capabilities over rights. In sum, it is the present view that the concept of *capability* might be a helpful one through which to interrogate the extent to which children with ASN in Scotland really do have enhanced agency rights in practice.⁸

⁸ The extent to which children with ASN do have enhanced agency rights in practice is an urgent question that Riddell and Carmichael (2019) begin to attend to in this special issue. However, this legislation is very recent and further research will be needed in the future to assess the long term impact of the legal changes.

Acknowledgement

This work was supported by the Economic and Social Research Council (ESRC) under grant reference number ES/P002641/1.

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